WAYS OF NECESSITY: PARTITION.—While it is often said that there are two possible ways in which an easement may arise, by agreement of the parties, express or implied, and by act of law, in the last analysis all easements arise only in one way, from a grant, express or implied.

A way of necessity, arising from a division of land by an owner, is always founded upon an implied grant.[1] The question arises whether a way of necessity is implied from a division of land by a partition decree under which one of the parcels is entirely enclosed by others. This is answered in the affirmative in California,[2] and while there is some authority contra,[3] it would seem that the position of the California courts is right.[4] A grant of an easement may be implied from an act of law when the circumstances are such that the easement could be implied in an ordinary conveyance.[5] It has been suggested by the English courts[6] in construing an act of Parliament, "that the Act although proceeding from the legislature as paramount authority, and not directly from the proprietors of the soil, must be read as equivalent to a grant by the latter." The Supreme Court of California declared that there is no difference in effect between allotment by order of the court in a proceeding for partition and an allotment by deed from all the other tenants in common.[7]

It is clear that if the partition were voluntary there would arise the implied grant of a way of necessity. The partition decree should have the same result. "The effect of such partition is to convey the interest of the various co-tenants in the particular parcels to the allottees of those parcels. Each is, therefore, a grantor and a grantee, and the one to whom an enclosed piece is set off has the same rights against the other that he would have if they joined in a voluntary conveyance to him."[8] The way of necessity arises from the division of the land and it is immaterial whether the division takes place by agreement of the parties or by decree of the court.[9]

Granted that the holder of the enclosed parcel has this right,

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[1] Bullard v. Harrison (1815), 4 M. & S. 387, 105 Eng. Rep. R. 877; Carey v. Rae (1881), 58 Cal. 159.

[2] Blum v. Weston (1894), 102 Cal. 362, 36 Pac. 778, 41 Am. St. Rep. 188; Accord, Ellis v. Bassett (1891), 128 Ind. 118, 27 N. E. 344.

[3] Murphey v. Lincoln (1891), 63 Vt. 278, 22 Atl. 418; Gaynor v. Bauer (1903), 144 Ala. 448, 39 So. 749; Mayfair Property Co. v. Johnston, [1894] 1 Ch. 508.

[4] See 6 Columbia Law Review, 280.

[5] Supra, n. 2.

[6] The London & N. W. Ry. Co. v. Evans, [1893] 1 Ch. 16; Accord, Rangeley v. Midland Ry. Co. (1868), L. R. 3 Ch. App. 306.

[7] Supra, n. 2.

[8] Mesmer v. Uharriet (Dec. 22, 1916), 52 Cal. Dec. 722.

[9] Cal. Code Civ. Proc., § 764, as amended in 1907 would seem to be merely declaratory of the then existing law.

is it not an equal and like right against each former co-tenant whose land prevents his access to a highway, and if so, who is to decide which particular parcel shall bear the burden? This question has apparently never been adjudicated. It was raised in *Mesmer v. Uharriet*,[10] and while not necessary to the decision of the case the court suggested a solution which seems reasonable and workable, viz: "Where the partition decree fails to provide roads, it may be that the location of ways of necessity should be fixed by a subsequent proceeding in which the owners of all the parcels which might be affected are brought in, and compensation may be provided to be paid to the owner of the parcel burdened with the easement by those who are relieved."

This would obviate the injustice which would result if the owner of one of the surrounding parcels should assume the burden of the easement to the advantage of the others, or if the holder of the enclosed parcel should be entitled to select a particular neighbor and place the burden upon his land.

F. H. W.

WILLS: INCORRECT AND INCOMPLETE DATE IN OLOGRAPHIC WILLS.—Probate of an olographic will was refused in *Estate of Vance*[1] because the testator inadvertently neglected to complete the year of the date so that it read " . . . . this 22nd day of March in the year of our Lord one thousand" instead of "one thousand nine hundred and ten." The will was held invalid because it did not contain a date within the meaning of section 1277 of the California Civil Code, defining an olographic will to be "one that is entirely written, dated and signed by the hand of the testator himself." By this decision, in accordance with a previous holding,[2] the California Supreme Court has followed the Louisiana Supreme Court[3] in establishing the distinction between an incorrect date, as where the year 1859 instead of 1889 is written,[4] which will not necessarily vitiate the olographic will, and an incomplete or deficient date, which will render the instrument invalid. The Louisiana court in making this distinction in the case of Heffner v. Heffner[5] referred to the fact that a similar distinction obtains among the French authorities in the inter-

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[10] Supra, n. 8.

[1] (Dec. 23, 1916), 53 Cal. Dec. 1.

[2] Estate of Carpenter (1916), 51 Cal. Dec. 335, 156 Pac. 464; cf. Estate of Price (1910), 14 Cal. App. 462, 112 Pac. 482.

[3] Heffner v. Heffner (1896), 48 La. Ann. 1088, 20 So. 281; Succession of Swanson (1912), 131 La. 53, 58 So. 1030; same case (1913), 132 La. 606, 61 So. 685.

[4] Estate of Fay (1904), 145 Cal. 82, 78 Pac. 340, 104 Am. St. Rep. 17.

[5] Supra, n. 3.